No. 78-1169

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In the Supreme Court of the United States

OCTOBER TERM, 1978

LINCOLN AMERICAN CORPORATION, LINCOLN AMERICAN LIFE INSURANCE COMPANY, CONSUMERS NATIONAL CORPORATION, RICHARD F. KEATHLEY, IRVING L. BERNSTEIN, ROBERT E. KELLY, SEYMOUR ROSENBERG, and JACK WILDER,

Petitioners,

vs.

MICHAEL SUSMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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LINCOLN AMERICAN CORPORATION, LINCOLN AMERICAN LIFE INSURANCE COMPANY, CONSUMERS NATIONAL CORPORATION, RICHARD F. KEATHLEY, IRVING L. BERNSTEIN, ROBERT E. KELLY, SEYMOUR ROSENBERG, and JACK WILDER,

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Lincoln American Corporation, Lincoln American Life Insurance Company, Consumers National Corporation, Richard F. Keathley, Irving L. Bernstein, Robert E. Kelly, Seymour Rosenberg, and Jack Wilder, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 23, 1978.

OPINIONS BELOW

The decision of the Seventh Circuit Court of Appeals to which this Petition is addressed is not yet reported; a copy of the opinion and a subsequent Order making minor changes to the text are included in Appendix A at pages A1-A11 and A14-A15. The also unreported opinion of the United States District Court appears in Appendix B at pages B1-B2. Because it incorporates the opinion rendered in *Flamm* v. *Eberstadt*, 76 C 427, a case which was subsequently consolidated with this one for purposes of appeal, Appendix B also includes a copy of that unreported decision at pages B4-B12.

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1). The Court of Appeals entered its decision on October 23, 1978 and denied rehearing on December 5, 1978 (Apx. A at A16-A17). An Order staying the issuance of the mandate until January 15, 1979 was entered on December 18, 1978 (Apx. A at A18-A19).

QUESTIONS PRESENTED

I.

When the named plaintiff's claims in a putative class action become moot, does the pendency of a renewed motion for class certification bestow independent legal status upon absent class members sufficient to satisfy the "case or controversy" requirement of Article III, Section 2, of the United States Constitution?

II.

Does the district court have jurisdiction to consider and decide a renewed motion by the named plaintiff for class

action certification after his individual claims have become moot as a result of a tender by the defendants?

III.

Does a derivative action on behalf of a no longer existing Delaware corporation survive the mootness of the plaintiff-representative's claims?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution

Article III. — The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all affecting Ambassadors, other public Ministers and Consuls,—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Michael Susman filed this lawsuit in April, 1973 purporting to represent a class composed of minority shareholders of Consumers National Corporation ("Consumers"), a Delaware holding company. He alleged violations of §10(b) of the Securities Exchange Act (15 U.S.C. §78(j)(b)) by defendants in connection with a forthcoming merger for cash between that company and Lincoln American Life Insurance Company ("Lincoln American Life"). The Complaint also contained derivative claims on behalf of Consumers based upon assertions that certain individual officers and directors of that company had breached common law fiduciary duties. While Susman originally prayed for injunctive relief against the consummation of the merger, he took no formal steps toward maintaining the *status quo* and the merger became effective on April 30, 1973 in accordance with Delaware law. Under the Plaintiff's theory the alleged wrongful conduct by Defendants necessarily ended with the merger at which time each Consumers shareholder had the option of either accepting $8.50 per share or pursuing his Delaware appraisal remedy. An Amended Complaint filed in December, 1974 changed the prayer for relief to one for money damages alone based upon the theory that the cash price offered to minority shareholders of Consumers in exchange for their shares was not fair. The defendants denied all material allegations in both pleadings.

On January 22, 1975, some twenty-one months after the lawsuit was filed, Susman filed his initial motion for class action certification under Rule 23, Federal Rules of Civil Procedure. No other former shareholder of Consumers has expressed any interest during the five-year pendency of this case in participating as a plaintiff or intervenor. The

motion was denied on June 30, 1976 on the ground that the class as defined (i.e., all Consumers minority shareholders from May 1, 1972 through April 30, 1973) was too broad. The Plaintiff accordingly pared down the putative class and moved for redefinition on August 13, 1976. The renewed motion was denied in December, 1976 on the ground that Michael Susman could not be an adequate representative under Rule 23(a)(4) so long as his brother, Arthur Susman, acted as legal counsel for Michael and the putative class. District Court Judge Joel M. Flaum and the United States Court of Appeals for the Seventh Circuit permitted an interlocutory appeal from that Order, and the reviewing court affirmed in *Susman v. Lincoln American Corp.*, 561 F.2d 86 (7th Cir. 1977).

Attempting to cure this deficiency, Michael Susman changed attorneys and filed a third motion for class certification. On November 17, 1977 while the renewed motion was being briefed, Defendants tendered to Susman the entire amount of his individual claim ($520) plus legally recoverable costs. Neither the Plaintiff nor the courts have seriously questioned the monetary adequacy of the tender. The Plaintiff, nevertheless, rejected it and Defendants filed a Motion to Dismiss on the ground of mootness. The Motion was granted on January 27, 1978 and the Plaintiff took an appeal.

On October 23, 1978 the Court of Appeals reversed all but that portion of the lower court's order which had dismissed the derivative claims against Lincoln American Life. Expressly acknowledging a conflict between its opinion and the Eighth Circuit's decision in *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F.2d 626 (8th Cir. 1975), the Court held:

> "... when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages." (Apx. A at A7)

Insofar as the derivative action aspects were concerned, the Court applied its reading of Delaware law concluding that the action on behalf of Consumers survived the merger as against all defendants except the surviving corporation. No mention was made of the effect, if any, of the tender upon Susman's ability to sue derivatively.

A Petition for Rehearing filed by Defendants was denied by the Court on December 5, 1978.

REASONS FOR GRANTING THE WRIT

I.

THE COURT'S OPINION CONFLICTS WITH RECENT DECISIONS OF THE UNITED STATES SUPREME COURT HOLDING THAT ONLY A PROPERLY CERTIFIED CLASS MAY SUCCEED TO THE ADVERSARY POSITION OF A MOOTED PLAINTIFF.

Citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L.Ed.2d 444 (1976) and *Sosna* v. *Iowa*, 419 U.S. 393, 95 S. Ct. 553, 42 L.Ed.2d 532 (1975), the Seventh Circuit in this case seemed to recognize that normally a class action must be certified to escape dismissal when the named plaintiff's claims became moot. (A6). The Court then went on to acknowledge that the facts here do not support the application of the so-called "relation back" exception which was outlined in *Sosna* and *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L.Ed.2d 54 (1975). However, expressly concerned with what they perceived as a significant danger to the vitality of class actions in general, the Court purported to carve out and apply a new exception for cases in which a motion for class certification "has been pursued with reasonable diligence" and is pending at the time when the named plaintiff's claims became moot. (A7)[1]

But our reading of several recent decisions by this Court fortifies the conclusion that the mere filing of a timely motion under F.R.C.P. 23 does not create adversary

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[1] Petitioners deny that Michael Susman, who waited *twenty-one months* to file his initial motion for class certification, can be considered "reasonably diligent" under any circumstances.

status in putative class members sufficient to meet the constitutional "case or controversy" requirement. *Board of School Comm'rs.* v. *Jacobs,* 420 U.S. 128, 95 S. Ct. 848, 43 L.Ed.2d 74 (1975) is a decision which the Seventh Circuit Court of Appeals has cited at least twice in the past for the proposition that if the interests of the named plaintiff disappear at a time when no adequate class determination has been made, the case is moot.[2] In *Jacobs* it appeared that the district court considered class treatment appropriate, but because there had been "inadequate compliance with the requirement of Rule 23(c)" when the plaintiff's claims became moot, this Court held the entire action moot. See also *Weinstein* v. *Bradford,* 423 U.S. 147, 96 S. Ct. 347, 46 L.Ed. 350 (1975), wherein the mootness occurred after certification had been denied.

Again and again this Court has stated that the act of class certification is pivotal in determining whether the claims of putative class members survive the mootness of the named plaintiff's interest:

(1) *Baxter* v. *Palmigiano,* 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed.2d 810 at 817, n.1 (1976):

> "Without such [class] certification and identification of the class, the action is not properly a class action."

(2) *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 430, 96 S. Ct. 2697, 49 L.Ed.2d 599 (1976):

[2] *Valentino* v. *Howlett,* 528 F.2d 975, 981 (7th Cir. 1976); *Winokur* v. *Bell Federal Sav. & Loan Ass'n,* 560 F.2d 271, 276 (7th Cir. 1977), *reh. den. in banc* 562 F.2d 1034 (7th Cir. 1977), *cert. den.* 98 S. Ct. 1507 (1978).

> "Counsel for the individual named respondents, the original student plaintiffs and their parents, argue that this litigation was filed as a class action, that all the parties have until now treated it as a class action, and that the failure to obtain the class certification required under Rule 23 is merely the absence of a meaningless 'verbal recital' which counsel insists should have no effect on the facts of this case. But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is nor was represented by a named party to this litigation. Except for the intervention of the United States, we think this case would clearly be moot."

(3) *Kremens* v. *Bartley,* 431 U.S. 119, 132-3, 97 S. Ct. 1709, 52 L.Ed.2d 184, 195 (1977):

> "[I]t is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot."

The clear import of these decisions is that the mere *possibility* of attaining representative status is insufficient to save an uncertified, putative class action from mootness when the named plaintiff's own interest disappears. There is no room under this well-established precedent for the Seventh Circuit's decision which gives constitutional significance to the mere filing of a motion for certification. Moreover, Chief Judge Fairchild in the Opinion even suggested that at least where the lower court proceeds with reasonable promptness to treat the class issue, it is arguable

that the *mere filing of a putative class action complaint* creates sufficient constitutional adversariness.[3] Petitioners believe, therefore, that the decision below is directly at odds with the aforementioned Supreme Court decisions and should be reversed.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS IN OTHER CIRCUITS HOLDING UNDER SIMILAR CIRCUMSTANCES THAT NO LIVE CASE OR CONTROVERSY EXISTS.

As previously noted, the Seventh Circuit expressly acknowledged a conflict between its decision and *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F.2d 626 (8th Cir. 1975). In that case four public housing applicants, on behalf of others similarly situated, challenged selection processes used by a local housing authority contending that they violated certain constitutional and statutory rights. The plaintiffs had either been rejected for housing or their applications had been indefinitely delayed. The complaint sought declaratory and injunctive relief. Three months after the suit was filed, the plaintiffs moved for class certification; in that same month the defendant changed its procedures to meet the plaintiffs' objections and voluntarily placed each named plaintiff-applicant in an apartment. Moreover, everyone else who seriously threatened to intervene as a party plaintiff was also placed. The defendant admitted that these actions were not taken in the normal course but rather were solely in response to the lawsuit. The lower court never ruled upon the pending class motion and instead held the entire action moot. The Eighth Circuit affirmed on appeal relying upon *Board of School Comm'rs* v. *Jacobs, supra,* the very decision which

[3] (A. 5, n. 2).

the Seventh Circuit in this case strove to distinguish. There is no doubt that the Seventh Circuit was correct in perceiving that its decision in this case was dramatically at lds with *Bradley.*[4]

In point of fact the Seventh Circuit wrote its opinion here in the face of a conflicting decision in its own circuit. The defendants in *Winokur* v. *Bell Federal Sav. & Loan Ass'n,* 560 F.2d 271 (7th Cir. 1977), *reh. den. in banc* 562 F.2d 1034 (7th Cir. 1977), *cert. den.* 98 S. Ct. 1507 (1978) were faced with a putative class action by depositors who complained of deceptive advertising practices violating the securities anti-fraud provisions. Two years after the suit was filed the named plaintiffs were denied the right to represent a class. Efforts to prosecute an interlocutory appeal from the order were unsuccessful. The defendants subsequently changed their interest-crediting practices to cure the plaintiff's objections and tendered to them the full amount of their claimed damages. The district court then dismissed the action for mootness. Determining at the outset that the claims of the named plaintiffs had been rendered moot, the Seventh Circuit held:

> "... since plaintiffs' individual claims are now moot, and plaintiffs have not been authorized to represent other class members, the action lacks a live controversy. There being no live controversy, the appellate court cannot exercise jurisdiction, even to reverse the class action determination and thus instill a live controversy into the action." 560 F.2d at 276.

In the *Winokur* opinion, which was also written by Chief Judge Fairchild, the Court relied upon *Board of School Comm'rs* v. *Jacobs* and *Weinstein* v. *Bradford, supra,* for the position that an uncertified class action falls with the

[4] See also *McCleary* v. *Realty Industries, Inc.,* 405 F. Supp. 128 (E.D. Va. 1975).

mootness of the named plaintiffs' claims. Like the instant case, *Winokur* did not present a factual situation in which the challenged conduct was "capable of repetition, yet evading review." *Geraghty* v. *U. S. Parole Commission,* 579 F.2d 238 (3rd Cir. 1978) at 251 n. 49. Michael Susman's complaints deal exclusively with purported misdeeds by the Defendants in preparation for the merger between Consumers and Lincoln American Life which was effected on April 30, 1973.

But notwithstanding the marked similarities to *Winokur* which expressly led District Court Judge Flaum to find it controlling in this case (B1), the Seventh Circuit in its *Susman* opinion purported to distinguish both *Winokur* and *Jacobs* . . . .

> "We think, however, that our instant case differs significantly from *Winokur* and from *Board of School Comm'rs* v. *Jacobs,* 420 U.S. 129 (1975), on which we relied in *Winokur.* Here, at the critical moment, the question of maintaining the class action had been freshly raised, consistently with the suggestion of the appellate court that it could be reopened after a change in counsel.
>
> We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole." (A5)

The court's holding was expressly limited to cases in which the motion had been presented "with reasonable diligence." (A8 at n. 4) Because Rule 23(c)(1) already imposes an "[a]s soon as practicable" requirement on all prospective class representatives as a condition of certification, the

Court came very close to holding that simple compliance with this rule saves a putative class action from mootness. In any event, as a result of *Winokur* and the decision in this case, there is considerable doubt as to the status of the law of mootness in this Circuit. There seems to be similar confusion in the Fifth Circuit after that court's opinions in *Satterwhite* v. *City of Greenville,* 578 F.2d 987 (5th Cir. 1978) and *Roper* v. *Consurve, Inc.,* 578 F.2d 1106 (5th Cir. 1978).[5]

In addition to *Bradley* and *Winokur,* the Court's decision in this case clashes directly with holdings in five other circuits. Most of the cases are discussed in *Vun Cannon* v. *Breed,* 565 F.2d 1096 (9th Cir. 1977) in which the Ninth Circuit also analyzed the Supreme Court decisions in depth holding that . . . .

> ". . . an improperly or non-certified class cannot succeed to the adversary position formerly occupied by a no-longer-aggrieved representative plaintiff whose own claim has become moot." *Id.* at 1098.

See *Kuahulu* v. *Employers Ins. of Wausau,* 557 F.2d 1334 (9th Cir. 1977); *Inmates* v. *Sheriff Owens,* 561 F.2d 560 (4th Cir. 1977); *Lasky* v. *Quinlan,* 558 F.2d 1133, 1136 (2d Cir. 1977); *Boyd* v. *Justices of Sp. Term,* 546 F.2d 526 (2d Cir. 1976); *Napier* v. *Gertrude,* 542 F.2d 825, 827 (10th Cir. 1976), *cert. den.* 429 U.S. 1049, 97 S. Ct. 759, 50 L.Ed.2d 765 (1977); *Shipp* v. *Memphis Area Office,* 581 F.2d 1167 (6th Cir. 1978) to the same effect. Of these cases including *Vun*

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[5] Circuit Judge Rubin in his *Roper* opinion did not even mention any of the Supreme Court cases discussed at pages 7 through 10 of this Petition in finding that the very act of filing a suit as a "class action" bestowed sufficient legal status upon absent class members. On November 29, 1978 the defendants in that case filed a Petition for Writ of Certiorari with this Court raising substantially similar questions of law (No. 78-904).

Cannon, only *Kuahulu* was even mentioned by the Seventh Circuit in its *Susman* opinion.

Vun Cannon v. *Breed* arose on a Petition for Rehearing after the Court had ruled that the named plaintiff, notwithstanding the mooting of his individual claim, could continue to represent an as yet uncertified class composed of Youth Authority wards seeking to prevent their transfer to a vocational institute. Noting the intervention of the Supreme Court decisions discussed above in this Petition, the Ninth Circuit reversed itself and held that it lacked jurisdiction to proceed further in view of the plaintiff's mootness and the absence of a properly certified class.

Mr. Vun Cannon's individual claims became moot and were dismissed in the district court approximately fourteen months after the suit was filed; the record reflected that as of that date he had made no effort to obtain class certification. 565 F.2d at 1101 (n. 7). In the instant case, Michael Susman waited twenty-one months to seek certification. His motion has since been twice denied, full appellate review was afforded on the only occasion when he sought it, and his claims became moot *four and one-half years* after the lawsuit began. Yet despite these facts which make this case an easier one for mootness than *Vun Cannon,* the Seventh Circuit reversed the district court's granting of Defendants' Motion to Dismiss for Mootness.

A clear majority of the United States Circuit Courts of Appeal addressing the issue have supported the conclusion that, except for the very narrow class of cases described by footnotes in *Sosna* and *Gerstein,* a putative but uncertified "class action" such as *Susman* ceases with the mootness of the named plaintiff's claims. *Vun Cannon, supra,* at p. 1100. The dramatic conflict between the circuits which the Seventh Circuit acknowledged in part, warrants resolution by this Court.

III.

THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING QUESTION OF CONSTITUTIONAL AND FEDERAL PROCEDURAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT, TO WIT: THE EXTENT TO WHICH A DEFENDANT MAY, BY VOLUNTARY ACTION, RENDER A PUTATIVE CLASS ACTION MOOT.

Petitioners believe that the decisions of this Court beginning with *Sosna* v. *Iowa, supra,* govern the disposition of this case standing, as they do, for the principle that uncertified class actions are moot when the named plaintiff's legal interest disappears. However, the Seventh Circuit in this case and the Fifth Circuit in *Roper* v. *Consurve, Inc.,* 578 F.2d 1106 (5th Cir. 1978), *cert. pending,* (No. 78-904), have apparently held that for reasons of policy the cause of the named plaintiff's mootness may be decisive in determining whether he can continue to press the lawsuit on behalf of an as-yet-uncertified class. The language of the *Roper* court, quoted and relied upon in *Susman,* presents the position succinctly:

> "The notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. . . . By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims."
>
> 578 F.2d at 1110
> (A8)

The issue is joined by decisions expressly to the contrary in *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F.2d 626 (8th Cir. 1975) and *Winokur* v. *Bell Federal Savings & Loan Ass'n,* 560 F.2d 271 (7th Cir. 1977) discussed previously in this Petition. In both of those cases the defendants consciously acted to satisfy the named plaintiff's claims and both courts nonetheless held the entire actions moot. In *Bradley* the defendants acted three months after the suit was filed and while the initial motion for certification was pending. Moreover, they "paid off" all other prospective intervenors. In *Winokur* the defendants altered the procedures to which the plaintiff was objecting and tendered the plaintiff's claimed damages after an effort to attain representative status had been denied by the district court.

Petitioners here argued unsuccessfully to the Seventh Circuit that this case was an easier one than either *Bradley* or *Winokur* since here the tender to Michael Susman was made *four and one-half years* after the lawsuit commenced and after *two* denials of class certification. Moreover, the argument pressed by the *Winokur* plaintiff that he had been deprived of his right to appellate review of the denial is unavailable here since Michael Susman did prosecute an unsuccessful interlocutory appeal.

We submit that the cause of Michael Susman's mootness is immaterial. And we do not agree with the Seventh Circuit's view that the integrity of the class action device is in jeopardy if defendants in putative class actions are permitted to satisfy individual claims. But even if there is some merit to that position, the courts should recognize that Rule 23 is not an end in itself. The law must continue to prefer the prompt and full disposition of genuine claims over the perpetuation of lawsuits only purportedly on behalf of absent parties. This Court should assume juris-

diction here to resolve the conflict between the circuits existing with respect to what Petitioners believe is an extremely significant question of constitutional and federal law.

IV.

AN ADDITIONAL CONFLICT BETWEEN THE CIRCUITS EXISTS WITH RESPECT TO THE MOOTNESS OF THE DERIVATIVE CLAIMS.

Throughout its analysis of the mootness issue, the Seventh Circuit assumed quite correctly that Michael Susman no longer has a personal stake in this litigation. Defendants tendered to him an amount equal to his maximum claim plus costs. Particularly under the circumstances of this case where Susman knowingly permitted Consumers, which he also purports to represent, to be merged out of existence during the course of this lawsuit, it is clear that his "derivative claims" are nothing more than an alternative theory seeking *individual* relief. There are two separate but related reasons as to why these claims are moot as well.

First, as this Court stated in *Ross* v. *Bernhard,* 396 U.S. 531, 90 S. Ct. 733, 24 L.Ed.2d 729 at 736 (1970), derivative claims belong not to the stockholder but to the corporation. When the corporation ceases to exist (particularly with the knowledge and apparent acquiescence of the plaintiff-stockholder), a derivative suit becomes meaningless. The Seventh Circuit's ruling to the contrary with respect to all but Lincoln American Life conflicts with the Second Circuit's holding in *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627 (2d Cir. 1967) . . . .

> "The corporation itself is no longer functioning for any purpose, so it is senseless to talk of benefits that will be derived from . . . (it) . . . by this litigation." *Id.* at 637.

In that case Leo Vine, a shareholder in Crown Finance Company ("Crown"), a Delaware corporation, purported to represent Crown derivatively as well as a class of its shareholders for the purpose of attacking a short-form merger of Crown into Beneficial Finance Co., Inc. ("Beneficial"). Vine alleged, *inter alia,* that Beneficial and certain principals of Crown defrauded Crown and its shareholders resulting in the merger at less than fair market value, all in violation of Rule 10b-5 and state common law.

On a motion to dismiss, the district court held that Delaware corporate law required a dismissal of the derivative claims. The Second Circuit reached the same result taking a slightly different approach. Even assuming *arguendo,* said the Court, that applicable state corporate law does not prohibit the individual plaintiff from continuing on with these claims, a derivative action is nevertheless inappropriate. Accordingly, the district court's holding was affirmed and the derivative claims dismissed.

Because Consumers National Corporation no longer exists, there is no corporate right or interest to be vindicated here. What Michael Susman calls a derivative action is, in reality, an "informal" class action seeking individual damages for himself and other minority shareholders.

Second, Michael Susman no longer has either an adversary interest or personal standing to press the purported derivative action since his claims have been satisfied and he is no longer a stockholder. *Tryforos* v. *Icarian Development Co., S.A.,* 518 F.2d 1258 (7th Cir. 1975). There is certainly no more of an existing "case or controversy" under this derivative theory than there is under the putative class analysis discussed above.

Petitioners submit that Article III, Section 2, of the United States Constitution and the cases cited in the foregoing sections of this Petition require a substantially greater degree of adversariness than that purportedly supplied by a legally disinterested plaintiff who claims to represent a non-existent corporation. Because the Seventh Circuit's opinion ignores the effect of Michael Susman's mootness and conflicts with the Second Circuit's decision in *Vine,* this Honorable Court should consider and resolve the issue in favor of Defendants-Petitioners.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Proceedings in the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1293

MICHAEL SUSMAN,

Plaintiff-Appellant,

v.

LINCOLN AMERICAN CORP., et al.,

Defendants-Appellees.

No. 78-1310

ANN FLAMM and ARNOLD FLAMM,

Plaintiffs-Appellants,

v.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 73 C 1089 and 76 C 427—Joel M. Flaum, *Judge.*

Argued September 14, 1978—Decided October 23, 1978

Before FAIRCHILD, *Chief Judge,* CUMMINGS and WOOD, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* This is the consolidated appeal from the dismissals of two class action complaints. The district court relying on this court's decision in *Winokur* v. *Bell Federal Savings and Loan,* 560 F.2d 271 (7th Cir. 1977), dismissed both actions as moot after the defendants tendered to the named plaintiffs their full monetary damages. We limit the *Winokur* language relied on by the district court and reverse its decision in both cases. We remand for determination of the motions for class certification that were pending at the time of the dismissal. In the *Susman* case, the district court also dismissed the plaintiff's derivative claims. We affirm that decision in part and reverse it in part.

In these cases, unlike *Winokur,* an appeal from the denial of class certification was effected under 28 U.S.C. § 1292(b). The facts of both cases were discussed in our decision in that appeal on the issue of whether plaintiffs' counsel could fairly and adequately represent the classes sought to be certified. *Susman* v. *Lincoln American Corp.,* 561 F.2d 86 (7th Cir. 1977). The facts will not be repeated here. In the prior decision we affirmed the district court's denials of class certification on the grounds that the relationship between the named plaintiffs and their counsel could lead to a conflict of interest and noted

> "[P]laintiffs are free to seek different counsel and thereby dispel any possibility of a conflict of interest. In lieu of a change of counsel which might result in a certification of the class actions, plaintiffs are not barred from continuing their lawsuits on their own behalf."
>
> 561 F.2d 96

Clearly we recognized potential further consideration of representation of the interests of class members by the named plaintiffs.

The plaintiffs in both cases sought and obtained new counsel. Renewed motions for class certification were then filed. While the renewed motions were pending the defendants tendered to the plaintiffs the amount of money they claimed to have lost as a result of the defendants' actions plus properly chargeable costs. The offers, which were made without admissions of liability by the defendants, and which were clearly made in an attempt to render the cases moot, were refused by the plaintiffs. Nevertheless, the district court held that the defendants' offers extinguished the controversies between the parties and that as a result the court no longer had jurisdiction to decide the motions for class certification. In the *Susman* case, the district court also dismissed the plaintiff's derivative claims.

THE CLASS ACTION

The Article III requirement that the federal courts decide only issues where there is an actual case or controversy between the parties is fundamental to our judicial system. *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971). The jurisdictional ban on making any decisions in moot cases (or, for that matter, in reviewing decisions already made) arises from this constitutional requirement. *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 306 n. 3 (1964); *Powell* v. *McCormack,* 395 U.S. 486, 496 n. 7 (1969). Yet a number of cases have been decided on the merits despite assertions that the original wrong complained of had been corrected, that the original plaintiff would no longer be affected by the outcome of the lawsuit, or that other changes in the underlying factual situation rendered the case moot. *See,*

e.g., United States v. *W. T. Grant Co.,* 345 U.S. 629 (1953) (corporate director resigned from interlocking directorates which were subject of the complaint); *Carroll* v. *President and Comm'rs of Princess Anne,* 393 U.S. 175 (1968) (ten day injunction complained of had expired two years previously); *Southern Pacific Terminal Co.* v. *I.C.C.,* 219 U.S. 498 (1911) (ICC order under attack had expired by its own terms); *Sosna* v. *Iowa,* 419 U.S. 393 (1975) (plaintiff had obtained the divorce she was seeking in another state). It is not necessary in this decision to discuss the variety of exceptions to the mootness doctrine that may be available in various cases.[1] What are important, here, however, as in *Winokur* are those cases which involve class action complaints.

In *Winokur* we were directly concerned with the question whether the right to appellate review of a denial of class certification could survive the death of the controversy. We held it could not. Our present case is different, and does not present that question. In *Winokur,* however, we set forth several generalizations, including

> 2. When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.

560 F.2d 277

This generalization literally applies to our instant case because at the critical moment there had been no determination that the action be maintained as a class action.

[1] There is an extensive discussion of the current state of the mootness doctrine in *Geraghty* v. *U. S. Parole Commission,* 579 F.2d 238 (3rd Cir. 1978).

We think, however, that our instant case differs significantly from *Winokur* and from *Board of School Comm'rs* v. *Jacobs,* 420 U.S. 129 (1975), on which we relied in *Winokur.* Here, at the critical moment, the question of maintaining the class action had been freshly raised, consistently with the suggestion of the appellate court that it could be reopened after a change in counsel.

We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole. We limit the language of generalization No. 2 in *Winokur* accordingly.[2]

Courts have consistently recognized that unnamed class members have an interest in a lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf. Thus, potential class members are given the opportunity to support or oppose class certification or to challenge the adequacy of representation by the named plaintiff. *Knuth* v. *Erie-Crawford Dairy Coop. Ass'n,* 395 F.2d 420 (3rd Cir. 1968). The statute of limitations on their individual causes of action may be tolled from the date of filing of the class action complaint. *American Pipe & Construction Co.* v. *Utah,* 416 U.S. 538 (1974). They may also have a right to be informed of, or even included in, a settlement that occurs prior to class certification. *Kahan* v. *Rosenteil,* 424 F.2d 161, 169 (3rd Cir.), *cert. denied,* 398 U.S. 950 (1970). Thus, at least in a limited sense, the interests of the unnamed class members

[2] It would be arguable, on the same theory, that a complaint with class action allegations sufficiently brings the interests of the class members before the court, at least where the court proceeds with reasonable promptness to reach the issue of class action maintenance. We do not need to reach that question. See footnote 4 *infra.*

are before the court during the pendency of a motion for class certification.

Normally, however, a class action must be certified as such in order for it to escape dismissal once the claims of the named plaintiff become moot. *Franks* v. *Bowman Transportation,* 424 U.S. 747 (1976); *Sosna* v. *Iowa,* 419 U.S. 393, 402 (1975). But the courts have recognized that an absolute requirement would prevent some otherwise justiciable claims from ever being subject to judicial review. Thus, in *Sosna,* the Supreme Court said

> "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and the reality of the claim that otherwise the issue would evade review."
>
> 419 U.S. 393, 402 n. 11

Clearly the Court had in mind situations where the nature of the complaint was such that the mere passage of time would usually make the individual plaintiff's complaint moot before a court could reasonably be expected to rule on a certification motion. And in practice that is how the "relation back" doctrine has been applied. *Gerstein* v. *Pugh,* 420 U.S. 103 (1975). We do not have such a situation here. But, just as necessity required the development of the relation back doctrine in cases where the underlying factual situation naturally changes so rapidly that the court cannot keep up, so necessity compels a similar result here. If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification. If a tender made to the individual plaintiff while the motion for certification

is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.

We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. The district court has jurisdiction to consider the motion for class certification and should hear and decide that motion prior to deciding whether or not the case is mooted by the tender. This does not mean that the district court should ignore the fact that a tender has been made. The tender may raise a question, on which we now express no opinion, as to the named plaintiffs' ability to fairly and adequately represent the class.[3] But the class certification issues should be addressed by the district court prior to dismissals of the lawsuits. We express no opinion on the appropriate decisions on the issues.

We acknowledge the conflict between this decision and that of the Eighth Circuit in *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F.2d 626 (8th Cir. 1975). We believe, however, that the result we have reached here is consistent with Article III, since in fact there will be no adjudication of the merits of the lawsuit unless there is first a determination that there are adversary parties and that the requirements of justiciability are present. *Geraghty* v. *U. S. Parole Commission,* 579 F.2d 238 (3rd Cir. 1978). Our decision in these cases is also consistent with the re-

---

[3] See *Kuahula* v. *Employers Insurance of Wausau,* 557 F.2d 1334 (9th Cir. 1977); *Roper* v. *Conserve,* 578 F.2d 1106 (5th Cir. 1978); *Banks* v. *Multi-Family Management, Inc.,* 554 F.2d 127 (4th Cir. 1977); and generally, H. Newberg, NEWBERG ON CLASS ACTIONS §§ 1085-1092.

cent decision of the Court of Appeals for the Fifth Circuit in *Roper* v. *Conserve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), which contained this language

> The notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. . . . By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims.
>
> 578 F.2d 1106, 1110[4]

Finally, although the recent decisions of the Ninth Circuit, in *Kuahula* v. *Employers Insurance of Wausau*, 557 F.2d 1334 (1977) and the Third Circuit in *Geraghty* v. *U. S. Parole Commission*, 579 F.2d 238 (1978) both involved factually distinct situations, their emphasis, like that in *Sosna*, on evaluating claims of mootness in light of the idiosyncrasies of each individual case is consistent with the approach we have used here.

THE DERIVATIVE CLAIMS

The district court dismissed the plaintiff Susman's derivative claims against Lincoln American and the individual defendants on the grounds that

> "Since plaintiff does not seek recession [sic] of the alleged illegal merger, once the merger took place

[4] The Fifth Circuit has held that the very filing of a class action complaint places the plaintiff in a representative capacity, even if no motion for certification has been filed or even if class certification has been denied. (See cases cited in *Roper*.) Our decision today is limited to the fairly narrow situation where a motion for certification has been pursued with reasonable diligence and is pending when a tender is made.

> plaintiffs lost the ability to sue derivatively. *See Voege* v. *Ackerman*, 364 F.Supp. 72, 74 (S.D. N.Y. 1973); *Basch* v. *Talley Indus., Inc.*, 53 F.R. D.9, 11-12 (S.D. N.Y. 1971); *Heit* v. *Tenneco, Inc.*, 319 F.Supp. 884, 887-88 (D. Del. 1970).
>
> No. 73C 1089 (No.D.Ill., Filed January 27, 1978)

The plaintiff contends that this ruling is in error since it involved the application of state rather than federal law and that even if state law is controlling, it was misapplied on the facts of the plaintiff's case. All of the parties have referred to Delaware law as the law to be applied to the extent that state law is controlling.

We do not need to address the plaintiff's assertion that federal rather than state law should apply in determining the capacity of a shareholder to bring a suit under the federal securities laws on behalf of a corporation that has been merged with a defendant corporation subsequent to the filing of the complaint since it is clear that the derivative claims asserted by the plaintiff are founded solely on state law.[5] Nor do federal equitable considerations come

[5] Paragraph 10 of the plaintiff's amended complaint sets forth specific allegations of improper activity by the defendants. Paragraph 11 recites that "The foregoing acts of defendants constitute deceptive devices, a scheme to defraud and misstatements and omissions to state material facts in connection with the purchase and sale of securities and in connection with the solicitation of proxies *to the detriment of minority shareholders and are violative of § 78y(6),* and the rules promulgated by the Securities Exchange Commission thereunder, including Rule 10B-5" (Emphasis added). Paragraph 12, in contrast, says "The foregoing also constitute a breach *of common law to the detriment of Consumers* and its minority shareholders in that: . . . ." (Emphasis added). The contrast between these two paragraphs clearly indicates that the federal claims are brought only on behalf of the minority shareholders (whom plaintiff seeks to represent in a class action), while the common law claims are brought both on behalf of the minority shareholders, and, derivatively on behalf of Consumers National.

into play, since the plaintiff did not attempt to enjoin the merger and is not now seeking rescission—in contrast to the situation we were presented with in *Ramsburg* v. *American Investment Co. of Ill.*, 231 F.2d 333 (7th Cir. 1956). The only question, then, is whether under Delaware law the plaintiff may maintain this derivative suit.

Delaware law is quite clear in stating that a derivative suit seeking only money damages brought on behalf of one corporation and against another cannot survive the merger of those two corporations regardless of whether the suit was filed before or after the merger took place. *Bokat* v. *Getty Oil Co.*, 262 A.2d 246 (Del. Sup. Ct. 1970). The dismissal of the derivative suit against Lincoln American, the surviving corporation, must therefore be affirmed.

Slightly more difficult is the question of whether the derivative suit can be maintained against third parties, even if it must be dismissed as against the surviving corporation. The Lincoln American defendants urge us to adopt the "common sense" approach of *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2nd Cir. 1967) which noted the meaninglessness of a derivative action brought on behalf of a non-existent corporation. But in *Bokat* the Delaware Supreme Court, after dismissing the derivative claim against the surviving corporation, explicitly said

> "This conclusion, however, does not mean that the claims asserted against the individual defendants, among them J. Paul Getty, have likewise been made moot. Such is not the case." 262 A.2d at 250.

Although this statement in *Bokat* was dictum (the individual claims were barred by the statute of limitations) it was made by the Delaware Supreme Court in a case subsequent to, and indeed citing the *Vine* case relied on by Lincoln American. It must, therefore, carry more weight in this case where we must apply Delaware law.

The cited language in *Bokat* has been analyzed at some length in a decision of the United States District Court for the Southern District of New York. *Abrams* v. *Occidental Petroleum Corp.*, 20 Fed. Rules Serv.2d 170 (S.D. N.Y. 1975) (interpreting California and Delaware law). Judge Palmieri concluded that the *Bokat* language was an attempt to reconcile the savings clause of 8 Del. Code § 261 with the anomalous situation of a corporation suing itself. Therefore, he reasoned, a derivative suit begun by a shareholder against third parties prior to a merger could be continued after the merger (because of § 261) but that a similar suit brought against what was to become the surviving corporation must be dismissed after the merger to prevent the incongruous situation of a corporation suing itself. 20 Fed. Rules Serv. 2d at 175.

We cannot disregard the clear language of the Delaware Supreme Court. We hold, therefore, that while the dismissal of the derivative claims against Lincoln American must be affirmed, the dismissal of those same claims against the individual defendants must be reversed.

Insofar as the judgments appealed from dismissed the actions as moot without considering the questions of certification, and insofar as the judgment in No. 78-1293 dismissed the derivative action against parties other than Lincoln American, they are reversed and the causes remanded for further proceedings consistent with this opinion. In all other respects they are affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 23, 1978

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 78-1293

MICHAEL SUSMAN,

Plaintiff-Appellant,

vs.

LINCOLN AMERICAN CORPORATION, a New York corporation, et al.,

Defendant-Appellees.

No. 78-1310

ANN FLAMM and ARNOLD M. FLAMM,

Plaintiffs-Appellants,

vs.

RUDOLPH EVERSTADT, JR. and MICRODOT, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.

Nos. 73-C-1089 — 76-C-427
JOEL M. FLAUM, *Judge*

OPINION BY JUDGE FAIRCHILD

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in these causes appealed from be, and the same is hereby, Affirmed In Part and Reversed In Part, and the causes Remanded, in accordance with the opinion of this court filed this date. Costs are to be awarded to appellants.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(ARGUED SEPTEMBER 14, 1978)

November 20, 1978

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 78-1293

MICHAEL SUSMAN,

Plaintiff-Appellant,

v.

LINCOLN AMERICAN CORP., et al.,

Defendants-Appellees.

No. 78-1310

ANN FLAMM and ARNOLD FLAMM,

Plaintiffs-Appellants,

v.

RUDOLPH EVERSTADT, JR. and MICRODOT, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 73 C 1089 and 76 C 427
JOEL M. FLAUM, *Judge*

ORDER

The Court's opinion of October 23, 1978 is corrected as follows:

Page 5, line 12 — 416 U.S. 538, should read 414 U.S. 538.

Page 6, footnote 3, line 1 — Kuahula v. Employers Insurance of Wausau, should read Kuahulu v. Employers Insurance of Wausau (also cited middle of page 7).

Page 6, footnote 3, line 2 — Roper v. Conserve, should read Roper v. Consurve (also cited on page 7, line 7).

Page 7, line 31 — Replace the name "Lincoln American" with "the Lincoln American corporate defendants."

Page 8, footnote 5 — Delete line 8 and insert the words "*minority shareholders and are violative of Section 10b of the Securities Exchange Act of 1934 (15 U.S.C.A. §§78j (b))*, and the".

Page 9, line 10 — Replace the name "Lincoln American" with the name "Lincoln American Life Insurance Company."

Page 10, line 11 and 12 — Replace the name "Lincoln American" with the name "Lincoln American Life Insurance Company."

Page 10, line 13 — Replace the word "individual" with the term "third party."

Page 10, line 19 — Replace the name "Lincoln American" with the name "Lincoln American Life Insurance Company."

It is unnecessary to reprint corrected copies of the Slip Opinion with these changes, which relate only to Appeal No. 78-1293.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1978

Before
Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

No. 78-1293

MICHAEL SUSMAN,
Plaintiff-Appellant,

vs.

LINCOLN AMERICAN CORP., et al.,
Defendants-Appellees.

and

No. 78-1310

ANN FLAMM and ARNOLD FLAMM,
Plaintiffs-Appellants,

vs.

RUDOLPH EVERSTADT, JR. and MICRODOT, INC.,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 73 C 1089 and 76 C 427
JOEL M. FLAUM, *Judge*

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled causes by defendants-appellees, no judge* in regular active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petitions for rehearing be, and the same are hereby, Denied.

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* Circuit Judge Philip W. Tone disqualified himself from any consideration of the petitions for rehearing and suggestions for rehearing *in banc*.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 18, 1978

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

No. 78-1293

MICHAEL SUSMAN,

Plaintiff-Appellant,

vs.

LINCOLN AMERICAN CORPORATION, a New York corporation, et al.,

Deferdants-Appellees.

No. 78-1310

ANN FLAMM and ARNOLD M. FLAMM,

Plaintiffs-Appellants,

vs.

RUDOLPH EVERSTADT, JR. and MICRODOT, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.

Nos. 73-C-1089 — 76-C-427
JOEL M. FLAUM, *Judge*

This matter comes before the court for its consideration upon the filing herein of the following documents:

1. The "Motion to Stay Issuance Of Mandate Pending Petition For Certiorari" filed herein on December 11, 1978 by counsel for the defendants-appellees in appeal No. 78-1239.
2. The "Motion For Stay Of Mandate" filed herein on December 11, 1978 by counsel for the defendants-appellees in appeal No. 78-1310.

On consideration thereof,

It Is Ordered that the mandates of this court are hereby, Stayed until January 15, 1979, in accordance with the provisions of Rule 41(b) of the Federal Rule of Appellate Procedure.

APPENDIX B

Proceedings in the United States District Court for the Northern District of Illinois, Eastern Division.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 1089

MICHAEL SUSMAN,

Plaintiff,

v.

LINCOLN AMERICAN CORPORATION, a New York corporation, LINCOLN AMERICAN LIFE INSURANCE COMPANY, a Tennessee corporation, CONSUMERS NATIONAL CORPORATION, a Delaware corporation, RICHARD F. KEATHLEY, IRVING L. BERNSTEIN, ROBERT E. KELLY, SEYMOUR ROSENBERG, and JACK WILDER,

Defendants.

MEMORANDUM OPINION

JOEL M. FLAUM, *District Judge*:

For the reasons stated by this court in *Flamm* v. *Eberstadt*, No. 76 C 427 (N.D. Ill. Dec. 30, 1977), this case must be dismissed in the authority of *Winokur* v. *Bell Federal Sav. & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977). As to plaintiff's contention that this case is distinguishable from

Flamm because it involves derivative claims, since plaintiff does not seek recession of the alleged illegal merger, once the merger took place plaintiff lost the ability to sue derivatively. *See Voege* v. *Ackerman,* 364 F.Supp. 72, 74 (S.D. N.Y. 1973); *Basch* v. *Talley Indus., Inc.,* 53 F.R.D. 9, 11-12 (S.D. N.Y. 1971); *Heit* v. *Tenneco, Inc.,* 319 F.Supp. 884, 887-88 (D. Del. 1970). Accordingly, the cause is dismissed.

It is so ordered.

Joel M. Flaum
United States District Judge

Dated: January 27, 1978

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 1089

MICHAEL SUSMAN,

Plaintiff,

v.

LINCOLN AMERICAN CORPORATION, a New York corporation, LINCOLN AMERICAN LIFE INSURANCE COMPANY, a Tennessee corporation, CONSUMERS NATIONAL CORPORATION, a Delaware corporation, RICHARD F. KEATHLEY, IRVING L. BERNSTEIN, ROBERT E. KELLY, SEYMOUR ROSENBERG, and JACK WILDER,

Defendants.

NOTICE OF APPEAL

TO: Randall L. Mitchell, c/o
Chapman & Cutler
Attorney for all Defendants
111 W. Monroe Street
Chicago, Illinois 60603

Notice is hereby given that the plaintiff, Michael Susman, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order of the United States District Court for the Northern District of Illinois dated January 27, 1978 dismissing the above-captioned cause.

A. Bradley Eben
A. Bradley Eben
230 West Monroe Street
Chicago, Illinois 60606
(312) 977-7730

February 23, 1978

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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76 C 427

ANN FLAMM and ARNOLD M. FLAMM,

Plaintiffs,

v.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,

Defendants.

MEMORANDUM OPINION

JOEL M. FLAUM, *District Judge*:

This case was filed as a class action asserting claims under the Securities Exchange Act of 1934, §§ 10(b), 14(e), 15 U.S.C. §§ 78j(b), n(e). In an opinion dated October 19, 1976, this court issued a ruling denying plaintiffs' motion for class certification because of plaintiffs' failure to meet the requirements of Fed. R. Civ. P. 23(a)(4). *Flamm* v. *Eberstadt,* 72 F.R.D. 187 (N.D. Ill. 1976). Thereupon, this court, pursuant to 28 U.S.C. § 1292(b), certified the issue of whether plaintiffs' were adequate representatives of the class they sought to represent to the court of appeals, and on January 25, 1977 that court granted plaintiffs' permission to appeal. In an opinion dated August 31, 1977, the Seventh Circuit affirmed this court's ruling denying plaintiffs' motion for class certification. *Susman* v. *Lincoln American Corp.,* No. 77-1145 (7th Cir. August 31, 1977).[1]

Plaintiffs' have again moved for class certification stating that the reason this court found them to be inadequate class representatives no longer exists and class certification is appropriate at this time. However, before the briefing on this question was completed and this court could rule on plaintiffs' motion, defendants, in a letter dated November 1, 1977, tendered[2] to plaintiffs the amount of money they claimed they had been individually deprived of by defendants' actions as alleged in the instant complaint. Defendants have now moved to dismiss plaintiffs' complaint on the ground of mootness arguing that there does not exist at this time a justicable, Article III of the Constitution "case or controversy" between plaintiffs and defendants. Thus, defendants argue that since plaintiffs have obtained all the relief they seek to obtain from this lawsuit it would be a waste of judicial energy, as well as a violation of the constitutional prohibition against courts rendering advisory opinions, to allow this case to continue. For this proposition defendants primarily rely on the recent decision in *Winokur* v. *Bell Federal Sav. & Loan Ass'n,* 560 F.2d 271 (7th Cir. 1977). After reviewing the briefs

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[1] This court had certified the *Flamm* case and the *Susman* case for purposes of an interlocutory appeal since they both involved the same class action issue.

[2] Although the plaintiffs challenge the adequacy of defendants' tender for several reasons, this court finds the letter to plaintiffs to constitute a valid tender to end the controversy between the named plaintiffs and defendants. *See, e.g.,* Guthrie v. Curnutt, 417 F.2d 764 (10th Cir. 1969); Martindell v. Lake Shore Nat'l Bank, 15 Ill. App. 2d 217, 145 N.E. 2d 784 (1957), *rev'd on other grounds,* 15 Ill. 2d 272, 154 N.E. 2d 683 (1958).

submitted by the parties, this court is compelled to grant defendants' motion because of the Seventh Circuit's ruling in *Winokur,* and accordingly this cause is dismissed.

In opposition to defendants' motion, plaintiffs present two arguments. First, plaintiffs rely on a line of cases starting with *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953), which hold that the "mere voluntary cessation of allegedly illgal conduct does not moot a case." *Burbank* v. *Twomey,* 520 F.2d 744, 747 (7th Cir. 1975). Plaintiffs argue from this proposition that defendants, by tendering to plaintiffs the amount of their individual claims, cannot moot this action by their own voluntary acts. This analysis, however, is incorrect. As was recognized in *Winokur,* the doctrine as enunciated in *W. T. Grant* only applies if there is the possibility that the defendant will continue in the future to infringe upon plaintiff's rights. *Winokur* v. *Bell Federal Sav. & Loan Ass'n,* 560 F.2d 271, 274 (7th Cir. 1977). Since plaintiffs do not seek injunctive relief in this cause, and since plaintiffs have not indicated that they fear that defendants will again injure them by way of further violations of the federal securities laws, plaintiffs' first argument based upon *W. T. Grant* and its progeny is without merit.

Plaintiffs' second argument, although more substantial in this court's view, is likewise without merit in light of *Winokur.* Plaintiffs argue that because they presently have pending a motion for class certification the mere fact that their individual claims may be moot does not render this action, as a class action, moot. Thus, plaintiffs rely on the limited exception to the mootness doctrine as applied to class actions delineated in *Gerstein* v. *Pugh,* 420 U.S. 103, 110-11 n.11 (1975), and as applied by this and other courts. *See, e.g., Langson* v. *Simon,* 74 F.R.D. 456 (N.D. Ill. 1977)

(Flaum, J.); *Custom* v. *Trainor,* 74 F.R.D. 413 (N.D. Ill. 1977) (Marshall, J.); *Robinson* v. *Leahy,* 73 F.R.D. 109 (N.D. Ill. 1977) (Flaum, J.).

In *Gerstein,* the Supreme Court was faced with an action by individuals who were in police custody for pretrial detention. The plaintiffs, seeking to represent a class of all persons subject to such pretrial detention who were not afforded preliminary hearings as to the charges levied against them, challenged their confinement as violative of due process of law. The Supreme Court, in reviewing the record before it, noted that the named plaintiffs had been convicted of the charges against them and were no longer in pretrial custody. Moreover, the court noted that the record was not clear as to whether at the time the trial court granted plaintiffs' motion for class certification the named plaintiffs were still in pretrial detention and had a viable case or controversy with the defendants. *Gerstein* v. *Pugh,* 420 U.S. 110-11 n. 11.

In considering whether the action was moot because the named plaintiffs' claims had been resolved, the Supreme Court stated that even if there had not been a live controversy between the named plantiffs and defendants at the time the class certification motion was granted, the plaintiffs' action could continue to vindicate the rights of those the named plaintiffs sought to represent. Thus, the court stated that although as a general rule a named plaintiff must be a member of the class he seeks to represent at the time the class is certified, and must at that time have a live controversy with the defendant, in order for a class action to continue in light of the subsequent mootness of the named plaintiff's claim, *see Sosna* v. *Iowa,* 419 U.S. 393 (1975), an exception to this rule existed when: (1) the nature of the plaintiff's and the class' claims were such that

the plaintiff would have suffered his injury before the court could rule on his motion for class certification; (2) it was certain that a constant class of persons suffering the deprivation existed; and (3) the attorney representing the named representative has other clients with a continuing live interest in the case, *i.e.*, a public defender. *Gerstein* v. *Pugh*, 420 U.S. at 111 n.11.

In the case at bar, plaintiffs argue that this action falls within the ambit of the *Gerstein* exception to the mootness doctrine and this court should rule that although the named plaintiffs' claims are moot this case should continue so as to vindicate the rights of the class the named plaintiffs seek to represent. Thus, plaintiffs argue that the unilateral action of defendants in tendering to the named plaintiffs the amount of their individual claims cannot be held to moot the class allegations because defendants will thereupon be able to prevent a class from ever having its claims vindicated.

While this court recognizes the rule as delineated in *Gerstein*, and as noted previously has applied that rule under different circumstances, this court is bound by the holding of the Seventh Circuit in *Winokur*. In *Winokur*, plaintiffs' filed a federal securities class action in which they sought injunctive and monetary relief. Plaintiffs sought to have a class certified but the district court found that plaintiffs had not established the propriety of maintaining their action on a class-wide basis. Plaintiffs' request to have the issue certified to the court of appeals pursuant to 28 U.S.C. § 1292(b) was denied and plaintiffs were barred from appealing the denial of class status since such orders are not appealable in this circuit. *See Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14

(7th Cir. 1972). Thereafter, defendant tendered to the named plaintiffs the amount of their individual claim and changed its policies to avoid creating the same difficulties from arising again. This court[3] thereupon dismissed the action as moot stating that no case or controversy existed between the named plaintiffs and defendant in light of the fact that class certification had been denied.

The court of appeals affirmed the order of dismissal. *Winokur* v. *Bell Federal Savings & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977). However, more importantly for the issues before the court in the case at bar, the court of appeals also held that it lacked jurisdiction to consider whether the district court had erred in denying class certification. Thus, plaintiffs' in *Winokur* argued that had the district court certified the class they sought to represent their action would not be moot even in light of defendant's tender. The court of appeals, plaintiffs argued, was therefore required to consider plaintiffs' request for class certification since plaintiffs' were not allowed to appeal the denial of their class motion previously. The Seventh Circuit rejected this argument stating the rule of law applicable to the case at bar as:

> When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.

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[3] This court was transferred the *Winokur* case after the denial of class certification.

It is clear to this court that the facts of this case, although different in minor respects, falls squarely within the ambit of the *Winokur* holding. Thus, as in *Winokur*, plaintiffs herein have had their motion for class certification denied and in fact this denial was affirmed. Defendants have tendered the named plaintiffs the amount of their individual claims and there is presently no case or controversy between them. The fact that their is presently pending a motion for class certification does not make this case different from *Winokur* since this is exactly the same as having an appeal before the court of appeals seeking a review of a class action motion denial.

Plaintiffs argue, however, that this court should not apply the *Winokur* case to their class action claims for several reasons. First, plaintiffs argue *Winokur* involved appellate review and the case at bar is still in the district court. While this is a difference, as stated above, it is not material. When an action becomes moot it ousts the court in which it is pending of jurisdiction to consider any other matters in that case. If the court of appeals felt itself barred by Article III to consider the propriety of class certification in *Winokur*, this court is no less barred from considering plaintiffs' renewed motion for class certification.

Second, plaintiffs argue that this court should treat its renewed motion for class certification as a motion to "reconsider" the prior denial of class certification. This, plaintiffs argue, would allow this court to make the granting of the class motion now "relate back" to the previous denial and would prevent any mooting of plaintiffs' class claims. However, this argument is simply a restatement of the plaintiffs' first argument and for the same reasons as previously mentioned must be rejected.

Finally, plaintiffs argue that *Winokur* is wrongly decided. Thus, plaintiffs argue that the rule stated in *Winokur* and previously quoted in this opinion is directly in conflict with the holding in *Gerstein* that class actions can be certified in certain cases where the named plaintiffs' claims are mooted prior to certification. However, whatever the merits of this argument, plaintiffs position must fail in this district court which is bound by the pronouncements of its court of appeals. This court recognizes that other courts, unlike the Seventh Circuit, have reviewed denials of class certification after plaintiff's claims have been mooted, *see, e.g., Cameron* v. *E. M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976); *but see Napier* v. *Gertrude*, 542 F.2d 825 (10th Cir. 1976), *cert. denied*, 97 S.Ct. 759 (1977). Moreover, this court notes that the Seventh Circuit did not cite *Gerstein* in its opinion in *Winokur* although it did cite cases decided after that decision.[4] Nevertheless, this court cannot say that the court of appeals did not consider *Gerstein* and find its principles inapplicable to the case at bar. It is possible that the court of appeals was of the opinion that the *Gerstein* exception did not apply in class actions to be certified under Fed. R. Civ. P. 23(b)(3) since it is not likely that defendants would repeat their illegal activity. Or perhaps the court decided that private class action attorneys did not meet the *Gerstein* requirement of class action counsel who had clients like the named plaintiffs interested in the vindication of the class' rights. Hence, whatever the court of appeals' reasons, *Winokur* is decided and its mandate must be obeyed.

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[4] In fact, the court in *Winokur* cited Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975), the decision in volume 420 of the United States Supreme Court Reports which immediately follows *Gerstein*.

Accordingly, this court must declare plaintiffs' action moot. The issues raised by plaintiffs concerning the problems of maintaining a class action when the defendants have the ability to moot the case must be resolved by the court of appeals in light of *Winokur*. On its facts this action is identical to *Winokur* and it must be dismissed.

It is so ordered.

Joel M. Flaum
United States District Judge

Dated: December 30, 1977